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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

3M COMPANY,

Plaintiff,

vs.

RX2LIVE, LLC and RX2LIVE, INC.,

Defendants.

Case No. 1:20-cv-00523-NONE-SAB

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR A
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

*[Filed concurrently with Plaintiff's Notice of
Motion; Declaration of Dale Giali;
Declaration of Carmine R. Zarlenga;
Declaration of Charles Stobbie; Declaration
of David A. Crist; and [Proposed] Order]*

Action Filed: April 10, 2020
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Jury Trial Demanded

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1 **I. INTRODUCTION**

2 The world currently faces the largest public health crisis in modern history. The
3 exponential growth in the number of COVID-19 cases in the United States has placed increased
4 pressure on healthcare personnel to treat patients, regardless of access to proper personal
5 protective equipment (“PPE”). 3M’s PPE products, including N95 respirators, are in immediate
6 need to protect medical professionals, first responders, and others who are working on the front
7 lines of the crisis. As a leading provider of PPE, 3M is committed to getting its PPE in the hands
8 of those who need it most in these unprecedented times. To meet the growing demand, 3M has
9 ramped up respirator production, but the demand still exceeds the supply.

10 Unscrupulous parties, such as Defendants, are using this time of desperation to fabricate
11 false associations with 3M and trade off of 3M’s famous brand and goodwill for self-gain—all at
12 the immeasurable expense of 3M, but more importantly at the expense of healthcare workers, first
13 responders, and the public at-large. In this instance, Defendants are falsely portraying an
14 affiliation with and authorization by 3M to sell 3M-branded products, and in doing so are offering
15 N95 respirators to unwitting California companies and consumers at grossly inflated prices.
16 However, Defendants are not authorized distributors, agents, brokers, or vendors of 3M products,
17 have no right to use 3M’s famous 3M marks, and have no authority to make offers or solicit
18 orders on 3M’s behalf. Defendants’ exploitation of a global health disaster to confuse and
19 deceive consumers into believing that Defendants are authorized representatives of 3M’s
20 products—and offering those products for sale at inflated prices—threatens immediate and
21 irreparable harm to 3M’s brand and to those desperately in need of PPE, including healthcare
22 workers working on the front lines of COVID-19.

23 The damage to the famous 3M brand and its associated goodwill as a result of Defendants’
24 unlawful conduct is immediate, immeasurable, and irreparable, and has the potential to define the
25 3M brand in the eyes of consumers for years to come. Indeed, Defendants’ offer to sell 3M-brand
26 N95 respirators supposedly “direct from 3M” at a price that is 4-5 times higher than 3M’s list
27 price gives the false impression that 3M is inflating its prices and condoning price-gouging in the
28 midst of a national emergency. This is not the case, and is antithetical to 3M’s organizational

mission and values. In fact, 3M has not increased its prices for PPE in response to the pandemic, despite costly measures to increase worldwide production.

Based on the foregoing, a temporary restraining order (“TRO”) and preliminary injunction (“PI”) are fully warranted. Indeed, on April 24, 2020, Judge Preska of the Southern District of New York granted 3M’s application for a temporary restraining order and an order to show cause in a similar action brought by 3M against another unscrupulous pandemic profiteer in *3M Co. v. Performance Supply, LLC*, No. 1:20-cv-2949 (LAP) (KNF). *See* Giali Decl. ¶ 2, Ex. 1. The court did not require 3M to post a bond. *Id.*

Absent injunctive relief, 3M is likely to suffer reputational damage and loss of goodwill that would be impossible to quantify. In this case and in other cases, healthcare providers and procurement officers strapped for resources and operating in a crisis mode are confused and misled by the false association tactics employed by bad actors such as Defendants. Absent a TRO and PI preventing Defendants from infringing and diluting 3M’s trademarks, unfairly competing, falsely claiming association with 3M, and engaging in false advertising and otherwise deceptive, unlawful, unfair, and fraudulent business acts and practices, 3M will suffer immediate injury to the goodwill and business reputation that it has worked for decades to build. 3M is also likely to succeed on the merits of each of its claims, including, in particular, its federal and state claims for trademark infringement and dilution, unfair competition, false endorsement, false association, false designation of origin, false advertising, and unlawful, unfair, and fraudulent business acts and practices, because Defendants are using 3M’s name and goodwill without authorization or endorsement from 3M, and for nefarious purposes that is causing immediate harm to 3M’s name and reputation.

Accordingly, this Court should grant 3M’s Motion for a TRO and PI that prohibits Defendants from such unlawful conduct, for which 3M has no adequate remedy at law.

II. STATEMENT OF FACTS

A. COVID-19 and the Current National Emergency

Over the last four months, the world has seen an outbreak of a highly contagious virus, known as COVID-19, creating an international state of emergency. The virus is believed to pass

1 from person-to-person via airborne particles and liquids. *See* Giali Decl. at ¶ 3, Ex. 2.

2 Current guidelines recommend that healthcare personnel wear respiratory protection, like
3 3M’s N95 respirator when interacting with infected patients in order to minimize the workers’
4 risk of exposure to the virus. *See id.* at ¶ 4, Ex. 3. According to the Center for Disease Control
5 and Prevention, reported illnesses resulting from exposure “range[] from very mild (including
6 some with no reported symptoms) to severe, including illness resulting in death.” *See id.* at
7 Ex. 2, p. 3. The number of cases of COVID-19 increases every day in the United States. *See id.*
8 at ¶ 5, Ex. 4.

9 N95 respirators can prevent virus-carrying particles from reaching the wearer when
10 appropriately selected, fitted, and worn over the mouth and nose. *See* Stobbie Decl. at ¶ 5. The
11 3M-branded N95 respirators are one of three respirator levels that meet the National Institute of
12 Occupational Safety and Health standards for minimum filtration efficiency levels as prescribed
13 by regulation 42 C.F.R. pt. 84. *Id.*

14 **B. The Parties and the Products**

15 **1. 3M and Its Famous Brand and Trademarks**

16 For decades, 3M has been a leading provider of personal protective equipment for
17 healthcare professionals, industry workers and the public. *See* Stobbie Decl. at ¶ 4. Indeed, 3M
18 is a leading manufacturer of N95 respirators, (*id.*), and has sold N95 respirators in the United
19 States under the 3M brand name for decades. *See* Crist Decl. at ¶ 10. Since the outbreak began,
20 the public has become familiar with 3M as a manufacturer of the N95 respirators and other
21 equipment essential to protecting healthcare personnel and workers from exposure to airborne
22 particles, including viruses like COVID-19. *Id.* at ¶ 18; Stobbie Decl. at ¶ 13.

23 Over the past century, 3M has invested hundreds of millions of dollars in advertising,
24 promoting, offering for sale, and selling its vast array of goods and services under its standard-
25 character mark “3M” and 3M design mark **3M** (together, the “3M Marks”). *See* Crist Decl.
26 at ¶ 10. During this period, 3M’s goods and services offered under its 3M Marks have been the
27 subject of widespread, unsolicited media coverage and critical acclaim. *See id.* at ¶ 11. Goods
28 and services offered under 3M Marks also enjoy enormous commercial success, with annual

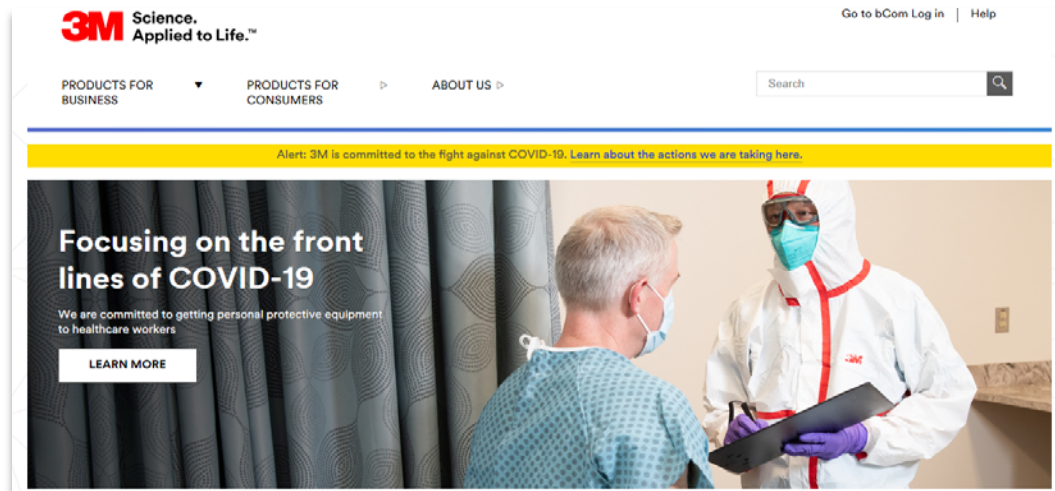
1 revenues exceeding hundreds of millions of dollars. *Id.* at ¶ 12.

2 To protect its rights over the 3M Marks, 3M has obtained numerous federal trademark
3 registrations for these marks, including but not limited to U.S. Trademark Reg. Nos.

4 (i) 3,398,329, covering the standard-character 3M mark for International Classes 9 and 10 for,
5 *inter alia*, respirators (the “329 Registration”) and (ii) 2,793,534, which covers the 3M design
6 mark in, *inter alia*, International Class 10 for respirators (the “534 Registration”). *See id.* ¶¶ 13-
7 17, Exs. 4, 6. The ‘329 and ‘534 Registrations are valid, in effect, and on the Principal
8 Trademark Register. *See id.* The ‘329 and ‘534 Registrations are “incontestable” within the
9 meaning of 15 U.S.C. § 1065. *See id.* Exs. 5, 7.

10 2. 3M’s Production and Sale of N95 Respirators During COVID-19

11 3M is proudly “on the front lines of COVID-19” providing the heroic individuals on the
12 front lines of the battle against COVID-19 with 3M-brand N95 respirators, which “are considered
13 the gold standard by medical workers and public-health officials.” Giali Decl. at ¶ 6, Ex. 5.



22 Since the outbreak of COVID-19 in early 2020, 3M has doubled its global output rate of
23 respirators (including N95 respirators) to 1.1 billion per year to ensure that an adequate supply of
24 its respirators is available to governments and healthcare personnel, as well as to workers in other
25 critical industries, including food, energy, and pharmaceuticals. *See Stobbie Decl.* at ¶¶ 8, 9, Exs.
26 1-3. In the last seven days of March 2020, 3M sent 10 million N95 respirators to healthcare
27 facilities around the United States. *See id.* at ¶ 10, Ex. 1. 3M has also invested the necessary
28 capital and resources to double its current global production of 1.1 billion 3M-brand N95

1 respirators per year to 2 billion per year. *See id.* at ¶ 11, Exs. 1, 3.

2 Notwithstanding the surging demand and public need for PPE during COVID-19, 3M has
3 confirmed publicly that it will not increase prices of its 3M-brand N95 respirators in authorized
4 sales and will work to eliminate price-gouging by third parties in the midst of this crisis. *See id.*
5 at ¶ 12, Ex. 3; *see also id.* at ¶¶ 14-16. These efforts protect the public from defective and/or
6 inferior products and outrageous and unwarranted price inflation. *Id.*

7 **3. Defendants and Their Purported Business**

8 Defendants are RX2Live, Inc., a Wyoming corporation, and RX2Live, LLC, a limited
9 liability company of unknown registration, purportedly operating out of Pleasant Grove, Utah and
10 Highland, Utah. *See Giali Decl.* at ¶¶ 12-14, Exs. 11-13. Defendant RX2Live, Inc. owns all of
11 the assets of Defendant RX2Live, LLC. *See id.* at ¶ 13, Ex. 12 at p. 1. Defendants describe their
12 business as being a franchisor in healthcare services, providing healthcare professionals with
13 access to products and services, including *inter alia* workplace and wellness programs, chronic
14 care management, medication dispensing services, allergy therapy services, and DNA testing, and
15 weight loss and wellness products and services to the general public. *See id.* at p. 2. Defendants’
16 CEO, Mr. Brian Hazelgren, is a self-described Author, Entrepreneur, and Trainer. *See id.* at ¶ 15,
17 Ex. 14. In the wake of COVID-19, Defendants have offered to supply a range of PPE products to
18 hospitals and healthcare providers, including the counterfeit 3M-brand N95 respirators at issue in
19 this action, as well as other N95 respirators, surgical masks, nitrile and PVC gloves, hand
20 sanitizer, isolation gowns, and supposed COVID-19 test kits. *See id.* at ¶¶ 16-17, Exs. 15-16.

21 **4. Defendants’ False and Deceptive March 27-30 Offers to Community** 22 **Medical Centers, Inc.**

23 Defendants are not, and have never been, licensed or authorized distributors, agents, or
24 representatives of 3M-branded N95 respirators. *See Crist Decl.* at ¶ 20; *Stobbie Decl.* at ¶¶ 17-18.
25 Nor have Defendants ever had an association or affiliation with 3M. *Id.*

26 Yet, in the midst of COVID-19, Defendants mobilized their entire franchise network of
27 approximately 68 franchises located in at least 14 states to offer 3M model nos. 1860 N95 and
28 8210 N95 respirators supposedly “direct from 3M” to health care customers at grossly inflated

prices. *See* Giali Decl. at ¶ 18, Ex. 17. To do so, Defendants equipped franchisees with a blank purchase order indicating that N95 respirators would be “direct from 3M” and an accompanying price list likewise indicating that 3M model no. 8210 respirators were available “direct from 3M” in large quantities and at the grossly inflated price of \$4.95 per respirator (4-5 times above 3M’s list price). *Id.* As Defendants had no means to secure any respirators “direct from 3M,” these representations (and any further representations based on them) were false, deceptive, and harmful to 3M’s trademarks, goodwill, and reputation.

To make matters worse, Defendants attempted to cover up and conceal all details related to transactions in the price-gouged 3M products through the use of a Non-Circumvention, Non-Disclosure & Working Agreement that Defendants also provided to their franchisees. *Id.* As a consequence, the full scope of Defendants’ wrongdoing is unknown.

As one specific example, on or about March 27-30, 2020, Virginia Cooper, whom on information and belief is an employee or agent of Defendants, contacted a Fresno-based healthcare provider, Community Medical Centers, Inc. (“CMC”), to advertise for sale PPE products available through Defendants, including purported 3M-brand N95 respirators. *See id.* at ¶¶ 16-17, Exs. 15-16. Defendants represented that the respirators were “direct from 3M,” and offered for sale “3M N95 1860” surgical respirators at \$5.20 per unit (as compared to 3M’s list price of \$1.27 per unit) and “3M N95 8210” standard respirators at \$4.95 per unit (as compared to 3M’s list price of \$1.02-\$1.31 per unit), with minimum purchase requirements of 10 million masks. *See id.* at ¶¶ 17, Ex. 16.

As shown in the table below, Defendants’ mark-up is 4-5 times greater than 3M’s listed prices:

3M Model	3M’s Per-Unit Price	Defendants’ Per-Unit Price	Approx. Markup
1860	\$1.27	\$5.20	309%
8210	\$1.02-\$1.31	\$4.95	278-385%

Defendants reproduced 3M’s Marks in a PowerPoint presentation provided to CMC. *See id.* 3M’s famous 3M design marks prominently appear in photographs of purported 3M-brand

1 N95 respirators. *Id.* The presentation also falsely represents that the respirators come “Direct
 2 from 3M” and that “3M requires payment in full before order can be placed. Payment is held in
 3 escrow until the order is completed.” *Id.* As stated, *supra*, Defendants are not, and have never
 4 been, authorized distributors, vendors, or representatives of 3M’s products. *See* Crist Decl. at
 5 ¶ 20; Stobbie Decl. at ¶¶ 17-18;. Defendants also do not have, and have never had, an association
 6 or affiliation with 3M. *See id.*

7 Defendants’ correspondence with franchisees and potential customers is permeated with
 8 false, misleading, and/or deceptive statements, and there is nothing to prevent Defendants from
 9 making similar offers to other customers around the United States, causing irreparable harm to the
 10 3M brand and putting the public at risk. Crist Decl. at ¶ 21-25; Stobbie Decl. at ¶¶ 17-18.

11 Based on the foregoing, 3M commenced this action against Defendants on April 10, 2020,
 12 asserting claims under federal and California law for trademark infringement, unfair competition,
 13 false endorsement, false association, false designation of origin, false advertising, and unlawful,
 14 unfair, and fraudulent business acts and practices. *See* Stobbie Decl. at ¶ 16; *see also* Dkt No. 1.¹
 15 After learning that in January 2019, Defendant RX2Live, Inc. acquired all of the assets of
 16 Defendant RX2Live, LLC, on April 19, 3M promptly amended its complaint to add Defendant
 17 RX2Live, Inc. *See* Dkt. No. 8. The Summons issued from the Court on April 20, and 3M duly
 18 served Defendants with the Summons and First Amended Complaint that same day.

19 **III. LEGAL STANDARD**

20 3M seeks a TRO and PI against Defendants’ use of the famous 3M Marks in conjunction
 21 with price-gouging. In the Ninth Circuit, “[t]emporary restraining orders are emergency
 22 measures, intended to preserve the status quo pending a fuller hearing on the injunctive relief
 23 requested.” *FreshPoint Denver, Inc. v. Trinity Fresh Distribution LLC*, No. 2:18-cv-03183-JAM-
 24 EFB, 2018 WL 6696676, at *2 (E.D. Cal. Dec. 20, 2018). “[R]equests for temporary restraining
 25 orders are governed by the same general standards that govern the issuance of a preliminary
 26 injunction.” *Rhorabough v. Cal. Dep’t of Corr.*, No. CIV S-05-1541-DFL-CMK-P, 2006 WL
 27

28 ¹ The Summons on 3M’s initial complaint issued from the Court on April 13, and 3M duly served
 Defendant RX2Live, LLC on April 15. *See* Dkt. No. 12.

2401928, at *1 (E.D. Cal. Aug. 18, 2006). A party is entitled to a preliminary injunction if it shows that (1) it is “likely to succeed on the merits”; (2) it is “likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities tips in [its] favor”; and (4) “an injunction is in the public interest.” *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008); *see also Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014).

Of particular significance here and now, harm both to parties within a lawsuit *and to the public* may be considered when determining if failure to issue a preliminary injunction will result in irreparable harm. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (public interest in preserving nature and avoiding irreparable environmental injury weighed in favor of preliminary injunction against proposed logging and timber sale in area damaged by fire).

For the reasons cited herein, 3M is entitled to a TRO and PI because it will likely succeed on the merits of its claims; it faces immediate, irreparable harm in the absence of swift injunctive relief and the balance of equities favors issuing the requested injunctive relief. Additionally, harm to the public from trademark infringement, false advertising, and price-gouging is readily apparent.

IV. LEGAL ANALYSIS

A. **3M Will Suffer Immediate, Irreparable Harm if Defendants’ Conduct Continues**

Irreparable harm is harm that “can seldom be adequately remedied by money damages and is often permanent or at least of long duration.” *Id.* (citation omitted); *see also Brooklyn Brewery Corp. v. Black Ops Brewing, Inc.*, 156 F. Supp. 3d 1173, 1185 (E.D. Cal. 2016) (“Irreparable harm must be of a peculiar nature, so that compensation in money alone cannot atone for it.”) (citation omitted). Here, Defendants’ conduct is likely to create immediate *and* continuing irreparable harm to the widespread fame and goodwill of the 3M brand and famous 3M Marks, which are synonymous with superior quality. This is not a coincidence. For more than a century, 3M has invested hundreds of millions of dollars in advertising and marketing products under its 3M Marks. *See* Crist Decl. at ¶ 10. 3M also implements rigorous quality-control standards to

1 ensure that all products offered under its famous 3M Marks are consistent and of the highest
2 quality. *Id.* at ¶ 9.

3 3M should not have its carefully curated brand and reputation left to the devices of
4 unsavory characters, like the Defendants. Yet, that is precisely what will happen in the absence
5 of an injunction. Indeed, Defendants are not an authorized distributors, agents, or representatives
6 of 3M products, including 3M-brand N95 respirators. Nonetheless, Defendants are using the
7 famous 3M Marks to create the false impression that they are authorized to solicit large orders for
8 N95 respirators at grossly inflated prices on 3M's behalf. Significantly, Defendants are not alone
9 in their price-gouging quest. Other parties are attempting similar scams and 3M is actively
10 investigating and/or pursuing claims against these bad actors. *See* Giali Decl. at ¶¶ 2, 9-11,
11 Exs. 1, 8-10.

12 3M's inability to control Defendants' use of the famous 3M Marks and Defendants'
13 suggested affiliation with 3M imperils 3M's brand and reputation—and irreparably so. *See* Crist
14 Decl. at ¶¶ 21-25. To be sure, 3M cannot control whether products offered for sale and/or sold
15 outside of its authorized trade channels adhere to 3M's rigorous standards. *See id.* What is more,
16 no amount of money could repair the damage to 3M's brand and reputation if it is associated with
17 deviating from its superior quality standards and the crime of price-gouging at the expense of
18 healthcare workers and other first responders during COVID-19. *Id.* This constitutes textbook
19 irreparable harm. *See, e.g., Brooklyn Brewery Corp.*, 156 F. Supp. 3d at 1185 (“In trademark
20 cases, courts have found irreparable harm in the loss of control of a business's reputation, a loss
21 of trade and loss of goodwill.”) (citation omitted).

22 Based on the foregoing, 3M has established irreparable harm.

23 **B. 3M is Likely to Succeed on the Merits of its Trademark-Related Claims**

24 To obtain a TRO and preliminary injunction, 3M must establish a likelihood of success on
25 the merits of only one of its claims. *See League of Wilderness Defenders/Blue Mountains*
26 *Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) (“We first analyze
27 whether the . . . plaintiffs are likely to succeed on the merits of any of their claims”).
28 Nonetheless, because the same standard governs 3M's claims for trademark infringement, unfair

1 competition, false endorsement, false association, and false designation of origin under Sections
 2 32 and 43(a)(1)(a) of the Lanham Act, and California common law (collectively, the “Claims”),
 3 3M analyzes these Claims together for purposes of the instant Motion. *See Silberstein v. Fox*
 4 *Entm’t Grp., Inc.*, 732 F. App’x 519, 517, (9th Cir. 2018) (“The tests for infringement of a
 5 federally registered mark under § 32(1), 15 U.S.C. § 1114(1), infringement of a common law
 6 trademark, unfair competition under § 43(a), 15 U.S.C. § 1125(a), and common law unfair
 7 competition involving trademarks are the same.”) (citation omitted); *Rearden LLC v. Rearden*
 8 *Commerce, Inc.*, 683 F.3d 1190, 1221 (9th Cir. 2012) (“It is undisputed that [plaintiff]’s state law
 9 trademark infringement claim (as well as their claim under the UCL to the extent it is based on
 10 infringement grounds) is subject to the same legal standards as their Lanham Act trademark
 11 claim.”); *New West Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1979)
 12 (“Whether we call the violation infringement, unfair competition or false designation of origin,
 13 the test is identical—is there a ‘likelihood of confusion?’”).

14 3M’s Claims require satisfaction of two elements: (1) ownership of a trademark, and (2)
 15 that 3M show a likelihood of confusion through the balancing of the eight factors laid out in *AMF*
 16 *Inc. v. Sleekcraft Boats*. 599 F.2d 341, 348-349 (9th Cir. 1979); *see also Pom Wonderful*, 775
 17 F.3d at 1124.

18 **1. The 3M Marks are Valid and Entitled to Protection**

19 3M’s incontestable ‘329 and ‘534 Registrations constitute *conclusive* evidence of, *inter*
 20 *alia*, 3M’s ownership, and the validity, of the 3M Marks. *See* 15 U.S.C. § 1115(b); *accord* 15
 21 U.S.C. § 1065, *Pom Wonderful*, 775 F.3d at 1124. Accordingly, 3M is likely to establish the first
 22 element of its Claims.

23 **2. Defendants’ Use of the 3M Marks and Slogan is Likely to Cause** 24 **Confusion**

25 To demonstrate a likelihood of success on the merits, 3M must also show that a
 26 reasonably prudent consumer in the marketplace is likely to be confused as to the origin of
 27 Defendants’ products and to associate those products with 3M. *Pom Wonderful*, 775 F.3d at
 28 1125. Courts in the Ninth Circuit look to the following eight *Sleekcraft* factors for guidance in

1 assessing the likelihood of consumer confusion: “(1) strength of the protected mark; (2) proximity
 2 and relatedness of the goods; (3) type of goods and the degree of consumer care; (4) similarity of
 3 the protected mark and the allegedly infringing mark; (5) marketing channel convergence; (6)
 4 evidence of actual consumer confusion; (7) defendant’s intent in selecting the allegedly infringing
 5 mark; and (8) likelihood of product expansion.” *Id.* (referencing *Sleekcraft*, 599 F.2d at 348-49).
 6 As demonstrated below, the balance of the relevant *Sleekcraft* factors weighs overwhelmingly in
 7 3M’s favor and 3M is likely to show a likelihood of consumer confusion.

8 **a. The First *Sleekcraft* Factor: the 3M Marks are Strong**

9 The strength of a mark is determined by its distinctiveness. *See Pom Wonderful*, 775 F.3d
 10 at 1126. “The stronger a mark—meaning the more likely it is to be remembered and associated in
 11 the public mind with the mark’s owner—the greater the protection it is accorded by the trademark
 12 laws.” *Brookfield Comm’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1058 (9th Cir. 1999).
 13 A mark’s strength is evaluated in terms of its conceptual strength and commercial strength. *JL*
 14 *Beverage Co., LLC v. Jim Beam Brands Co.*, 828 F.3d 1098, 1106 (9th Cir. 2016).

15 **i. The 3M Marks are Conceptually Strong**

16 A mark’s conceptual strength “depends largely on the obviousness of its connection to the
 17 good or service to which it refers.” *Id.* at 1107 (citation omitted). “Marks can be conceptually
 18 classified along a spectrum of generally increasing inherent distinctiveness as generic,
 19 descriptive, suggestive, arbitrary, or fanciful.” *Brookfield*, 174 F.3d at 1058.

20 “3M” is not a word, and has no inherent relationship to the goods or services for which the
 21 marks are used, namely, N95 respirators. Accordingly, the 3M Marks are fanciful and, thus,
 22 inherently distinctive when used for respirators. *One Indus., LLC v. Jim O’Neal Distrib., Inc.*,
 23 578 F.3d 1154, 1164 (9th Cir. 2009) (“fanciful” marks are those that “have no intrinsic
 24 connection to the product with which the mark is used” and consist of “wholly made-up terms”)
 25 (citation omitted); *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 506 (9th Cir. 1991)
 26 (“A strong mark is inherently distinctive, for example, an arbitrary or fanciful mark; it will be
 27 afforded the widest ambit of protection.”) (citation omitted).

28 / / /

ii. The 3M Marks are Commercially Strong and Famous

A mark’s commercial strength takes into account a mark’s “actual marketplace recognition.” *Brookfield*, 174 F.3d at 1058 (“[P]lacement within the conceptual distinctiveness spectrum is not the only determinant of a mark's strength”; actual marketplace recognition can “transform a suggestive mark into a strong mark”); *see also Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1144 (9th Cir. 2002) (“[A]lthough a suggestive or descriptive mark . . . is inherently a weak mark, it ‘may be strengthened by such factors as extensive advertising, length of exclusive use, public recognition’”) (citations omitted).

Even in the absence of 3M's incontestable registrations, 3M is likely to establish that its 3M Marks have acquired secondary meaning. As discussed above, 3M has spent millions of dollars in advertising, marketing, and promoting goods and services under the 3M Marks; goods sold under the 3M Marks, including 3M's N95 respirators, generate hundreds of millions of dollars in annual revenue; the 3M Marks are recognized and well-known in households around the U.S.; and 3M has been the exclusive source of goods and services offered under the 3M Marks for several decades. Crist Decl. at ¶¶ 8-12, 18; Stobbie Decl. at ¶ 4.

Several courts throughout the country have held that the foregoing establishes the commercial strength of the 3M Marks. *See, e.g., 3M Co. v. Christian Invs. LLC*, No. 1:11CV0627 TSE/JFA, 2012 WL 6561732, at *8-9 (E.D. Va. July 12, 2012) (“The 3M mark is not only distinctive, it has become a famous mark through the long use and promotion by the plaintiff . . . Plaintiff has used the 3M mark since 1906, it offers more than 50,000 products and services in a wide variety of fields and markets under the 3M mark, the 3M mark is distinctive and distinguishes the source of plaintiff's products and services, and plaintiff has obtained hundreds of registrations for the 3M mark for numerous products and services”).

Based on the foregoing, the first *Sleekcraft* factor favors 3M.

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b. The Second *Sleekcraft* Factor: Defendants Reproduced the 3M Marks on the Same Goods

“Where goods are related or complementary, the danger of consumer confusion is heightened.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992); *see also Brookfield*, 174 F.3d at 1055 (“Related goods are generally more likely than unrelated goods to confuse the public as to the producers of the goods.”). Here, as discussed above, Defendants aim to offer the same N95 respirators that 3M already offers under the respective Marks. It has become commonplace knowledge that 3M manufactures N95 respirators. Defendants’ offering of N95 respirators under the 3M Marks heightens the likelihood of consumers confusing the source of products from Defendants as originating from 3M. *Id.* (“In light of the virtual identity of marks, if they were used with identical products or services likelihood of confusion would follow as a matter of course.”).

c. The Third *Sleekcraft* Factor: In the Era of COVID-19, Normally Prudent Purchasers Must Make Rash Purchasing Decisions

“In assessing whether there is a likelihood of confusion, courts look to the reasonably prudent purchaser exercising ordinary caution.” *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1393 (9th Cir. 1993). Low consumer care increases the likelihood of confusion. *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2004). In the current state of emergency, even ordinarily cautious purchasers – such as hospitals and healthcare providers – are not able to take the time necessary to exercise extensive caution when searching for life-saving N95 respirators and other PPE. Accordingly, in this unique environment, this *Sleekcraft* factor favors 3M.

d. The Fourth *Sleekcraft* Factor: Defendants Reproduced the 3M Marks In Their Entirety

Defendants reproduced the 3M Marks in their entirety in the PowerPoint presentation that was used to market the purported 3M N95 respirators to customers, such as CMC. Accordingly, the fourth *Sleekcraft* factor favors 3M. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1206

(9th Cir. 2000) (“Quibbles over trivial distinctions between these two logos are unimpressive. The logos are glaringly similar.”).

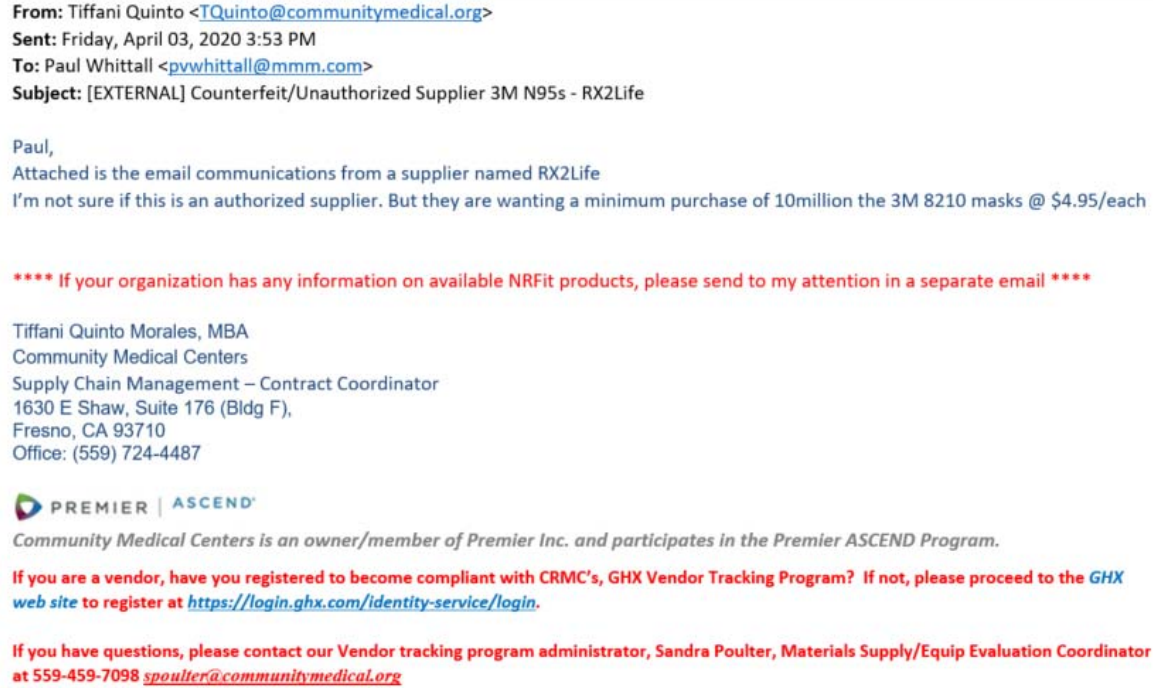
e. The Fifth *Sleekcraft* Factor: Defendants Sell in 3M’s Marketing Channel

The fifth *Sleekcraft* factor addresses whether the products were sold in the same marketing channels. *Sleekcraft*, 599 F.2d at 353. This factor undoubtedly weighs in favor of 3M. Defendants’ sale of N95 respirators to the same class of purchasers as 3M’s sale of legitimate 3M N95 respirators and Defendants’ representation that the N95 respirators came “direct from 3M” is strong evidence of marketing channel convergence. *See id.* (finding convergent marketing channels where sales by plaintiff and defendant were made through authorized retail dealers and the general class of purchasers exposed to the products overlapped).

f. The Sixth *Sleekcraft* Factor: Defendants Actually Confused CMC

Under the sixth *Sleekcraft* factor, evidence that the use of the two marks has already led to confusion is persuasive proof that future confusion is likely. *Sleekcraft*, 599 F.2d at 352. Here, there is evidence that Defendants sufficiently confused Tiffani Quinto, a contract coordinator at CMC in Fresno, to lead her to ask for follow up on 3M N95 masks. *See* Giali Decl. at ¶ 19, Ex. 18. Ms. Quinto, then contacted 3M stating, “[a]ttached is the email communications from a supplier named RX2Life [sic] *I’m not sure if this is an authorized supplier.*” *See id.* at ¶ 20,

Ex. 19 (emphasis added). A clearer case of actual confusion would be difficult to conceive.



g. The Seventh *Sleekcraft* Factor: Defendants Intentionally Selected the 3M Mark For Use on Their Products

Although an “intent to confuse consumers is not required for a finding of trademark infringement,” an “intent to deceive is strong evidence of a likelihood of confusion.” *Entrepreneur*, 279 F.3d at 1148 (citations omitted). “When the alleged infringer knowingly adopts a mark similar to another’s, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived.” *Sleekcraft*, 599 F.2d at 354 (citations omitted). “The point is not that an intent to confuse is relevant as some measure of culpability. Rather, the alleged infringer’s judgment as to what is likely to be confusing is relevant because it may well be accurate.” *Entrepreneur*, 279 F.3d at 1148.

Prior to the rise of COVID-19, 3M’s federal trademark registrations placed Defendants on constructive notice of 3M’s superior rights in and to, among other things, the 3M Marks. *See* 15 U.S.C. § 1072 (“Registration of a mark on the principal register [constitutes] constructive notice of the registrant’s claim of ownership thereof”). Subsequent to COVID-19, 3M’s manufacture and sale of N95 respirators has become common, household knowledge, with government

officials like President Donald Trump and Vice President Mike Pence drawing extensive attention to 3M and its respirator masks over the last month. *See* Giali Decl. at ¶ 7, Ex. 6.

Accordingly, there is no question that Defendants adopted, copied, and used the 3M Marks with actual knowledge of 3M's rights therein. Thus, there is likewise no question that Defendants used (and continue to use) the 3M Marks to confuse consumers and exploit the Marks' widespread fame and goodwill. Based on the foregoing, the seventh *Sleekcraft* factor favors 3M. *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1073 (E.D. Cal. 2009), *aff'd*, 348 F. App'x 288 (9th Cir. 2009) ("Such copying is strong evidence of a desire to confuse the marketplace and trade on [the plaintiff's] goodwill and brand name."); *see also Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 758 (9th Cir. 2018) ("When one party knowingly adopts a mark similar to another's, reviewing courts presume that the defendant will accomplish its purpose, and that the public will be deceived.").

h. The Eighth *Sleekcraft* Factor: The Likelihood of Product Expansion is Relatively Unimportant on These Facts

"The likelihood of expansion in product lines factor is relatively unimportant where two companies already compete to a significant extent." *GoTo.com*, 202 F.3d at 1209 (quoting *Brookfield*, 174 F.3d at 1060). Here, the N95 respirators produced by 3M and the N95 respirators advertised by Defendants already compete for sales, and accordingly, this factor is neutral.

i. The Balance of *Sleekcraft* Factors Strongly Favors 3M

In sum, the balance of relevant *Sleekcraft* factors weigh heavily in 3M's favor. As in *Sleekcraft*, "[w]hen the goods produced by the alleged infringer compete for sales with those of the trademark owner, infringement usually will be found if the marks are sufficiently similar that confusion can be expected." *Sleekcraft*, 599 F.2d at 348. Such a showing establishes that 3M is likely to succeed on the merits of its federal and state trademark infringement and unfair competition claims.

C. The Balance of Hardships Tips Decidedly in 3M's Favor

Defendants would not suffer any hardship if this Court restrains and enjoins them from engaging in unlawful and unscrupulous activity with respect to 3M's brand and 3M Marks; 3M,

on the other hand, would suffer substantial hardship if Defendants continue to irreparably harm the 3M brand and 3M Marks via their unlawful activity.

1. Defendants Would Not Suffer any Hardship if this Court Grants 3M’s Motion for a TRO and PI

3M’s Motion concerns Defendants’ recent use of the 3M brand and 3M Marks during the global COVID-19 pandemic in a manner that creates the false impression that Defendants are authorized representatives of 3M and/or 3M’s products. 3M’s Motion also concerns Defendants’ recent decision to offer to sell purported 3M-brand N95 respirators to resource-strapped customers at exorbitant prices that far exceed the excessive pricing prohibited under California’s price-gouging law and constitute unlawful and unfair business practices in violation of California Business and Professions Code §§ 17200 *et seq.* Penal Code §§ 396(b) (making it unlawful to sell or offer to sell any consumer goods, emergency supplies, or medical supplies for a price of more than 10 percent greater than the price charged by that person for those goods immediately prior to the declaration of emergency); 396(i) (“A violation of this section shall constitute an unlawful business practice and an act of unfair competition within the meaning of Section 17200 of the Business and Professions Code.”).

Put simply, it would not be a “hardship” for Defendants to refrain from engaging in unlawful activities related to 3M’s brand (which constitute, *inter alia*, trademark infringement, false association, and price-gouging in violation of California Penal Code § 396 and California Business and Professions Code §§ 17200 *et seq.*). This is especially true given that Defendants sell products unrelated to 3M’s brand (*e.g.*, other PPE and wellness services), and could continue doing so even if this Court grants 3M’s Motion. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 867 (9th Cir. 2017) (relying on “long-settled principle that harm caused by illegal conduct does not merit significant equitable protection”); *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d 824, 829 (9th Cir. 1997) (“In this circuit, as well as in other circuits, a defendant who knowingly infringes another’s copyright ‘cannot complain of the harm that will befall it when properly forced to desist from its infringing activities.’”) (citation omitted).

1 **2. 3M Would Suffer Substantial Hardship in the Absence of a TRO and**
 2 **PI**

3 Unlike Defendants, 3M would suffer substantial hardship in the absence of a TRO and PI.
 4 Indeed, as discussed *passim*, Defendants’ unlawful conduct is irreparably harming and tarnishing
 5 the 3M brand, as well as the widespread fame, goodwill, and reputation enjoyed by the famous
 6 3M Marks. *See* Giali Decl. at ¶ 8, Ex. 7; Crist Decl. ¶¶ 21-25. Accordingly, the balance of
 7 hardships tips decidedly in 3M’s favor. *See Life Alert Emergency Response, Inc. v. LifeWatch,*
 8 *Inc.*, 601 F. App’x 469, 473-74 (9th Cir. 2015) (a declaration detailing “the numerous and
 9 persistent complaints from would-be customers who received robo-calls for what they believed
 10 were [plaintiff’s] products” substantiated the “threat to [plaintiff’s] reputation and good will” and
 11 supported a finding of irreparable harm); *Brooklyn Brewery*, 156 F. Supp. 3d at 1185 (“Grounds
 12 for finding irreparable injury include loss of control of reputation, loss of trade, and loss of good
 13 will.”) (citation omitted).

14 **D. Issuing a TRO and PI Would Serve the Public’s Interest in Avoiding**
 15 **Confusion**

16 During the current COVID-19 pandemic, consumers and healthcare providers, including
 17 those here in California, understandably lack the time and resources they would have in normal
 18 purchasing environments to ensure that sellers are who they purport to be (*e.g.*, authorized
 19 distributors of 3M-brand products), and that products are what sellers claim they are (*e.g.*,
 20 genuine 3M-brand products). Accordingly, when the public sees purported 3M-brand N95
 21 respirators available for sale, they are relying on the 3M Marks and standards associated with the
 22 3M brand now, more than ever, to indicate that the respirators offered for sale are, in fact, genuine
 23 and adhere to the 3M brand’s rigorous standards.

24 Sellers, such as Defendants, are seeking to exploit the fact that consumers are making
 25 rapid purchasing decisions during COVID-19 by falsely representing themselves as authorized
 26 distributors of 3M-brand products, as well as offering to sell those products at exorbitantly high
 27 prices. Not only is this unlawful conduct likely to confuse and deceive the public about the
 28 source and quality of purported 3M-brand products offered under the 3M Marks, but also it

1 creates an overall purchasing environment that is materially different from, and irreparably
2 harms, the carefully curated 3M brand and customer experience.

3 Accordingly, unless this Court restrains and enjoins Defendants' unlawful conduct, the
4 public will continue to suffer harm in the form of confusion and deception about the source and
5 quality of the purported 3M-brand N95 respirators that Defendants are offering to sell for
6 exorbitantly high prices. *Internet Specialties W., Inc. v. Milon-DiGiorgio Enters., Inc.*, 559 F.3d
7 985, 993 n.5 (9th Cir. 2009) ("The public has an interest in avoiding confusion between two
8 companies' products."); *Seed Servs., Inc. v. Winsor Grain, Inc.*, 868 F. Supp. 2d 998, 1005 (E.D.
9 Cal. 2012) ("The public interest in preventing trademark infringement is avoiding confusion in
10 the marketplace[.]" even where no product has yet been distributed and only inquiries have been
11 made); Cal. Penal Code § 396(a) ("[W]hen a declared state of emergency or local emergency
12 results in abnormal disruptions of the market, the public interest requires that excessive and
13 unjustified increases in the prices of essential consumer goods and services be prohibited.").

14 **E. 3M Should Not Be Required To Post A Bond**

15 Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary
16 injunction or a temporary restraining order only if the movant gives security in an amount that the
17 court considers proper to pay the costs and damages sustained by any party found to have been
18 wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). This Court has wide discretion in
19 setting the amount of the bond and may dispense with the posting of a bond entirely "when it
20 concludes there is no realistic likelihood of harm to the defendant from enjoining his or her
21 conduct." *Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003).

22 No one, and especially not Defendants, will suffer any harm if the Court grants the
23 requested TRO and preliminary injunction and enjoins Defendants' deceptive, unlawful, unfair,
24 and infringing activities. Furthermore, 3M has more than sufficient financial resources to cover
25 any harm resulting from an improvidently granted injunction. A bond is superfluous in these
26 circumstances.

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1 **V. CONCLUSION**

2 Based on the foregoing, 3M respectfully requests that this Court grant the enclosed
3 [Proposed] Order to Show Cause, which temporarily restrains and preliminarily enjoins
4 Defendants' use of the 3M Marks pursuant to Fed. R. Civ. P. 65(a)-(b). 3M also respectfully
5 requests any further relief the Court deems just and equitable.

6 Dated: April 27, 2020

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